

REMARKS

Applicant respectfully request reconsideration in view of the following remarks. Claims 1, 3-18, 20-28, 30-39, 41-48, 50-56, 68, 69, 71, 72 and 86-91 are rejected under 35 U.S.C. 103(a) as being unpatentable over AF 300 from Nufarm MSDS, Infosafe No. NU003.

According to the MSDS, Agricrop's AF 300 herbicide, Infosafe No. NU003 contains, *inter alia*, "solvent 400," otherwise known as kerosene. Applicant respectfully requests reconsideration of the rejection based on U.S.C. 103(a) for obviousness because claim 1 contains the transitional phrase, "consisting essentially of." This transitional phrase is interpreted in the case law as, "commonly used to signal a partially open claim in a patent. . . [b]y using the term 'consisting essentially of,' the drafter signals that the invention necessarily includes the listed ingredients and is open to unlisted ingredients *that do not materially affect the basic and novel properties of the invention* (emphasis added). (*PPG Industries v. Guardian Industries, Corp.*, 156 F.3d 1351, 1354 (Fed. Cir. 1998) (rehearing *en banc* declined Nov. 25, 1998)).

According to many reports in the industry, kerosene **would** materially affect the basic and novel properties of the present invention. In the "2004 Louisiana Suggested Weed Control Guide," available at <http://www.lsuagcenter.com/weedguide/pdf>, visited December 20, 2004, kerosene has a "toxicity rating" between 2-3. A toxicity rating between 2-3 means that the compound "causes burns and blisters [to] moderately irritating." Additionally, kerosene in herbicides is dangerous to the eye, skin and respiratory systems of mammals. It can cause a

potentially fatal chemical pneumonia and inflammation in fish. “Even in small amounts of diesel and kerosene in water is highly toxic to fish.”¹

Furthermore, kerosene is often described as an “inert ingredient” in herbicides. An “inert ingredient” is defined as an ingredient that “enhances the action of the active ingredient” (emphasis added).²

Further evidence that kerosene causes problems is that Agricrop Affray 300 Herbicide’s formulation was changed . Enclosed is a copy of the February 3, 2003 Material Safety Data Sheet (“MSDS”). According to the new MSDS, Agricrop’s AF 300 herbicide, has replaced the kerosene (Solvent 400) with Solvesso 150. Also enclosed is a declaration from Johnnie Roberts which has the MSDS as an Appendix. The declaration establish that kerosene causes problems.

Therefore, kerosene clearly, materially, would affect the basic and novel properties of the present invention, thus, cannot fall within the scope of claim 1 of the Applicant’s invention according to the applicable case law.

In view of the above, applicant believes the pending application is in condition for allowance.

¹ http://www.powerlink.net/fen/tmwfall99_05.html visited December 20, 2004.

² <http://chppm-www.apgea.army.mil/ento/mpmh/chap6.htm> visited December 20, 2004.
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Applicant believes no fee is due with this response. However, if a fee is due, please charge our Deposit Account No. 03-2775, under Order No. 00306-00142-USU from which the undersigned is authorized to draw.

Respectfully submitted,

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Enclosure: Johnnie Robert's Declaration